Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling That State	)	WC Docket No. 03-251
Commissions May Not Regulate Broadband	)	
Internet Access Services by Requiring BellSouth	)	
to Provide Wholesale or Retail Broadband	)	
Services to CLEC UNE Voice Customers	)	

COMMENTS OF VONAGE HOLDINGS CORP.

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SUMMARY

BellSouth refuses to sell its ADSL broadband service to certain consumers for an overriding purpose: to protect its legacy circuit-switched services from competition from voice services offered by CLECs, wireless carriers, cable companies, and voice-over-IP providers. Because most small businesses and many consumers do not have a comparable broadband alternative to BellSouth ADSL, BellSouth is able to force them to make a choice they should not have to make – to give up either their chance of obtaining broadband or their right to choose a different voice provider.

DSL tying not only eliminates consumer choice in the voice market, but it also undermines the potential of broadband to integrate digital voice and data with home appliances, other services and applications, and with each other. Broadband therefore remains more expensive and less attractive to American consumers, who as a result are falling further and further behind other countries that increasingly are leading the broadband revolution. The cost efficiencies of VoIP and broadband can reverse this course by fueling demand for each other – but only if consumers have the freedom to choose their preferred broadband and voice service providers based upon the strength of the service offerings, unfettered by limitations imposed via the strength of a provider's market power. The elimination of DSL tying is an essential step in putting this power of choice into the hands of consumers.

BellSouth's preemption petition relies heavily on the Commission's apparent finding that its tying policy does not constitute discrimination against CLECs under Section 251. Regardless, DSL tying must be condemned as unreasonable and discriminatory against *consumers*, in violation of Sections 201 and 202. DSL tying contravenes Commission precedent and unreasonably denies service requests from consumers who wish to purchase BellSouth ADSL service. The consequence of BellSouth's discrimination is especially severe for the millions of customers who have no comparable alternative to BellSouth ADSL. DSL tying deprives these

consumers of the opportunity to take full advantage of competitive and innovative services from VoIP providers, wireless carriers, and other competitive alternatives, without any offsetting public interest benefit.

Finally, failure to prohibit tying would surrender the future of innovation and development of consumer broadband services and application to the mercy of the broadband infrastructure companies – companies that are often more adept at protecting entrenched services than developing new ones. To encourage the widest possible development of new broadband services, the Commission should enjoin DSL tying requirements in order to promote innovation and broadband adoption and to safeguard competition and consumer choice.

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COMMENTS OF VONAGE HOLDINGS CORP.

Vonage Holdings Corp. ("Vonage") respectfully submits these comments through undersigned counsel in response to the Commission's Public Notice issued in the above-referenced docket on December 30, 2003.

Introduction

BellSouth often claims that its broadband agenda is about the future,[1] but the purpose of this particular petition is unfortunately an attempt to cling to the past. For the first time in American history, the number of incumbent LEC circuit-switched access lines has recently been in decline.[2] Consumers increasingly wish to take advantage of innovative and competitive voice services offered by CLECs, wireless carriers, cable companies, and voice-over-IP (VoIP) information services providers such as Vonage, in place of their existing legacy voice services from the ILEC. To stem its losses, BellSouth seeks to leverage its strong position in the

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1 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation, (April 8, 2003) at 44. In arguing for elimination of unbundling rules on network elements used for broadband, BellSouth asserted that "while [broadband] regulation certainly impacts current investment decisions, it imposes the greatest threat on future technologies . . . . and [their] potential to bring life altering resources and applications to everyone . . . .")

2 *See, e.g.*, *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. August 7, 2003) at Table 7.1.

broadband market to protect its voice services by forcing customers to keep BellSouth's circuit-switched service as a condition of receiving ADSL service[3] from BellSouth.

BellSouth's tying requirement has considerable force because many customers, especially small businesses, have no comparable alternative to BellSouth ADSL. BellSouth dominates the consumer DSL market more than any other Bell company because of its ubiquitous deployment of Digital Loop Carrier (DLC) systems, where competition from CLECs is non-existent and appears likely to remain so. In BellSouth's region in Florida, for example, 90% of end users are served by DLC loops, and as a result BellSouth controls 99% of the DSL market.[4] Whether this is because CLECs are genuinely impaired without access to additional UNEs, or whether it is because CLECs are not willing or able to commit the necessary resources, the fact remains that customers served by DLC loops will in almost no cases be able to purchase DSL service from a CLEC. Cable broadband, meanwhile, does not reach all homes served by BellSouth DSL, and reaches hardly any businesses. BellSouth has admitted that "a substantial number of Georgia customers have access to BellSouth DSL but not to cable broadband,"[5] and presented studies indicating that 99% of small businesses and at least 25% of residences do not have access to cable broadband.[6]

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[3] BellSouth applies its tying policy to both its retail FastAccess ADSL-based information service and to its underlying wholesale ADSL transport telecommunications services. Therefore, third-party ISPs that use BellSouth ADSL transport to provide retail broadband services cannot provide service to end-users who do not also purchase retail BellSouth circuit-switched services.

[4] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 1-3 and Exhibit 1 (presenting evidence based upon BellSouth's admissions and testimony that 90% of end-users in the BellSouth-Florida region are served by DLC loops, and that BellSouth possesses a 99% share of the DSL market in its region in Florida.)

[5] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 10).

[6] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 11-12 and Exhibit 3 (citing evidence presented by BellSouth in the Florida Digital-BellSouth arbitration that cable broadband service is obtained by less than 1% of small and medium sized businesses, and that, for the foreseeable future, cable broadband providers were unlikely to extend the availability of broadband service to approximately 25% of their residential customers.).

For these millions of customers who have no comparable broadband alternative, given the choice of a BellSouth bundle or no broadband at all, many forgo the opportunities of voice alternatives such as wireless phones or Vonage's VoIP service to avoid being shut out of broadband, while others, finding the bundle to be too expensive, forgo broadband altogether. These consumers therefore not only must continue to wait for the benefits of broadband competition, but they are also denied the benefits of competitive and innovative voice services from VoIP providers, wireless carriers and CLECs that would otherwise be available to them today.

BellSouth now asks the Commission to not only endorse but immunize its tying policy by preempting states from regulating its tying practice. Instead, however, the Commission should find that "DSL tying"[7] is unlawful and contrary to federal policy. In Section I, Vonage demonstrates that DSL tying undermines federal policy favoring competition and innovation because it eliminates certain consumer choices, inflates the retail cost of both broadband and voice services, and suppresses competition. Section II explains that DSL tying violates Sections 201 and 202 of the Act by imposing unreasonable and discriminatory terms on consumers who wish to purchase broadband service from BellSouth and voice service from someone else or from no one at all. Therefore, the Commission should deny BellSouth's preemption petition and enjoin DSL tying requirements.

I. DSL TYING HURTS CONSUMERS BY LIMITING CHOICE AND SUPPRESSING DEMAND FOR INNOVATIVE AND COMPETITIVE BROADBAND AND VOICE SERVICES

DSL tying prevents consumers from purchasing service not only from CLEC voice providers, but also wireless and VoIP providers. The Kentucky Commission found that BellSouth's "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the

[7] Vonage applies the term "DSL tying" not to bundling generally but specifically to any practice in which a DSL provider refuses to provide service except to its voice services subscribers.

prerogative of Kentucky customers to choose their own telecommunications carriers."[8] By limiting the ability of consumers to choose their preferred voice provider, the tying of voice and DSL suppresses competition and innovation in the voice services market, to the detriment of consumers, the American economy, and this Commission's objectives. VoIP has already revolutionized the market for international toll calls, but its even more important potential is just emerging on the horizon. As Chairman Powell observed, VoIP is "a lifestyle-changing, new, fantastic technology" that is "the most vibrant innovation to come into the American economy, the global economy in decades – in centuries even."[9] VoIP tremendously expands the potential scope and variety of features of traditional voice services and will enable the integration of voice service with other consumer and business applications. Given an appropriate regulatory framework and a fair chance to compete, VoIP will in the near future dramatically enhance the productivity and efficiency of communications for millions of Americans. Tying policies designed to deter consumer adoption of VoIP services hurt consumers and the economy by artificially deferring the realization of these advances.

The suppression of VoIP and other alternatives has repercussions well beyond the voice market. By preventing consumers from taking advantage of cheaper and more dynamic voice service alternatives, tying also suppresses broadband adoption and broadband-induced innovation. It is widely recognized that two of the most important factors that could stimulate broadband penetration in the United States are the emergence of "killer" broadband applications and a reduction in broadband prices. By ensuring that consumers have the ability to purchase VoIP instead of circuit-switched service, the Commission would advance both of these stimuli. Vonage's full-service VoIP products work only with always-on broadband connections; thus, the

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[8] BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers, WC Docket 03-251, Petition (hereinafter, "BellSouth Petition"), at Attachment 8 (July 12, 2002 Order of the Kentucky Public Service Commission at 7).

[9] *Petition of Level 3 for Forbearance from Assessment of Access Charges on Voice-Embedded IP Communications*, WC Docket 03-266, Petition (Dec. 23, 2003) at 1 (quoting Kudlow & Kramer: Interview with Chairman Michael K. Powell (CNBC Television, Nov. 19, 2003)).

enhanced functionalities and competitive prices offered by VoIP attract new customers to broadband.[10] In addition, when consumers are able to factor into the broadband price equation significant savings on voice services, the net price of broadband would decrease dramatically. For example, the monthly "base price" of BellSouth's residential FastAccess ADSL service is $49.95, a price that is higher than what many consumers are willing to pay.[11] However, for consumers who would be able to save $20-30+ monthly by using VoIP[12], but only if they could purchase stand-alone ADSL from BellSouth, their net cost of broadband would be cut at least in half.[13] This effective broadband price cut could be powerfully significant, not only to consumers, but to the American economy, since high prices of course deter broadband adoption. The United States trails much of the industrialized world in broadband penetration, and the countries with the highest adoption rates typically have lower broadband prices.[14] The cost

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[10] *See, e.g.*, Remarks of Commissioner Kathleen Q. Abernathy, Overview of the Road to Convergence: New Realities Collide with Old Rules, January 22, 2004, at 2 ("Hopefully, VOIP is the 'killer app' we have all been awaiting to bolster marketplace incentives to build out broadband facilities to all Americans.")

[11] *See, e.g.*, Remarks of Chairman Powell, October 25, 2001 ("the intriguing statistic is that though [85%] of households have [broadband] availability, only 12% of these households have chosen to subscribe. There are many possible reasons for the demand gap. Consumers may not yet value the services at the prices they are being offered.") http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html.

[12] Actual savings vary widely based upon customer's toll calling patterns and desired service options.

[13] Because broadband also allows consumers to save money they now spend on dial-up ISP services and second telephone lines, a $50 DSL service could in conjunction with VoIP savings have a net cost approaching zero. At such low net prices, broadband would be far more compelling to millions of Americans who now have access to it but choose not to buy it. Such a dynamic could quickly help the United States to catch up to other countries in broadband penetration, such as South Korea, where 94% of Internet users have broadband, or at least Canada, where 50% of users do. *See* International Telecommunications Union Internet Reports, *Birth of Broadband* (September 2003), Executive Summary Statistical Annex. http://www.itu.int/osg/spu/publications/sales/birthofbroadband/exec_summary.html (viewed January 26, 2004).

[14] *See, e.g., World Broadband Statistics, Q3 2003, January 2004,* www.point-topic.com. In 2003, the United States dropped out of the top 10 in broadband penetration rates. The countries with the highest penetration rates – South Korea, Hong Kong, Japan and Canada, have long had lower retail broadband prices, although the gap has decreased in the past year due to the falling dollar and lower promotional rates by some of the larger DSL providers in the United States. The International Telecommunications Union recently echoed this conclusion, finding that "Prices play perhaps the most important role in promoting broadband demand. Successful broadband economies are characterized by low prices—typically as a result of flourishing competition and innovative pricing schemes that attract a wide variety of customers." *See* International Telecommunications Union Internet Reports, *Birth of Broadband* (September 2003), Executive Summary at § 6, http://www.itu.int/osg/spu/publications/sales/birthofbroadband/exec_summary.html (viewed January 26, 2004).

efficiencies of VoIP and broadband can reverse this course by fueling demand for each other – but only when allowed.

The ability of VoIP to stimulate broadband adoption is proven. At the beginning of 2001, there were fewer than 10,000 DSL lines in the entire country of Japan.[15] Just three years later, Softbank/Yahoo's compelling VoIP service in Japan helped it to amass 3.5 million DSL customers – more than any American provider and yet only one-third of the now-booming Japanese DSL market. Softbank has never been a circuit-switched voice provider and therefore does not force its customers to purchase POTS as a condition of obtaining broadband. Thus, more than 90% of Softbank's customers purchase VoIP service, and for many the attractiveness of VoIP was an important selling point for broadband.[16] The millions of consumers in BellSouth's region, by contrast, are unable to drop their circuit-switched voice service in favor of VoIP if they also wish to purchase DSL. As a result, the BellSouth region not only has lower VoIP penetration than Japan, but now has lower broadband penetration as well.[17] DSL tying therefore perpetuates a vicious cycle in which the American people fall further and further behind in the broadband revolution.

The Commission should act decisively to eliminate this significant obstacle to broadband innovation. In addition to its fundamental duty to promote and protect the public interest,[18] the Commission is charged by Section 706 of the 1996 Act to "encourage the deployment on a

[15] *See* http://www.dsllife.com/newsletter/q1-03/newsletter_inthenewsQ1_03.html (viewed January 27, 2004).

[16] *See* "Japan's Softbank Connects as Leader of Internet Calling," *Investor's Business Daily* (December 31, 2003), http://biz.yahoo.com/ibd/031231/tech_1.html (viewed January 20, 2004).

[17] Japan surpassed the United States in broadband penetration during Softbank's boom in subscribership. *See* International Telecommunications Union Internet Reports, *Birth of Broadband* (September 2003), at Figure 1 http://www.itu.int/osg/spu/publications/sales/birthofbroadband/exec_summary.html (viewed January 26, 2004). With significantly higher broadband growth rates than the United States, Japan is likely to surge far ahead -- unless changes are made to the market dynamic in the United States. *See* International Broadband, Presentation by Sam Paltridge of the OECD to the NARUC/NECA National Summit on Broadband Deployment, April 2003, slide 6, http://www.neca.org/source/NECA_2253.asp (viewed January 27, 2004) (indicating that Japan's broadband growth rate exceeded the United States by approximately 67%.).

[18] DSL tying violates Sections 201 and 202 of the Act, contravenes Commission precedent, and harms consumers. See Section II, *infra*.

reasonable and timely basis of advanced telecommunications capability to all Americans." A prohibition of DSL tying would advance the Commission's objectives on all of these fronts. By freeing DSL customers to take advantage of alternative voice services, intermodal competition and innovation would be significantly bolstered. The Commission has increasingly encouraged the development of alternative platforms and technologies to stimulate the competition envisioned by the 1996 Act. In some Section 271 cases, for example, it deemed wireless telephone service to be an alternative to circuit-switched wireline local service sufficient to demonstrate the existence of competition.[19] Similarly, Commissioner Abernathy recently expressed optimism that VoIP "is increasingly creating the robust, facilities-based voice competition that the framers of the 1996 Act envisioned."[20] Intermodal competition will have the best chance of success if Commission policy is guided by a basic principle – consumers should have the freedom to choose their preferred broadband and voice service providers based upon the strength of the service offerings, unfettered by limitations imposed via the strength of a provider's market power. The elimination of DSL tying is an essential step in putting this power of choice into the hands of consumers.

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[19] *Application by SBC Communications, Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Inc. for Authority to Provide In-Region, InterLATA Services in Nevada*, WC Docket 03-10, Memorandum Opinion and Order, (rel April 14, 2003) at ¶¶ 17-18.

[20] *See, e.g.,* Remarks of Commissioner Kathleen Q. Abernathy, Overview of the Road to Convergence: New Realities Collide with Old Rules, January 22, 2004, at 1.

DSL tying represents a classic violation of the antitrust laws,[21] and consumers might until recently have been expected to turn to private enforcement actions in the courts to vindicate their right to purchase their desired broadband and voice services from separate providers. However, the Supreme Court's decision in *Verizon v. Trinko* places foremost responsibility for enforcement of antitrust principles on the Commission. In justifying its recusal from at least certain areas of antitrust enforcement in telecommunications, the Supreme Court held as a "factor of particular importance ... the existence of a regulatory structure designed to deter and remedy anti-competitive harm."[22] Thus, the Commission's first line of defense against anti-competitive conduct is the regulatory structure of Title II of the Act. The Commission has previously found that a tying practice can violate Section 201 without making findings with respect to market power that are necessary to establish a violation of the antitrust laws.[23] As demonstrated below, DSL tying imposes unreasonable and discriminatory consequences on consumers not only where the tying carrier possess market power, but also where it does not. Therefore, the Commission need not apply antitrust law at this juncture; however, it must act to fulfill its antitrust responsibility. That responsibility starts with an analysis of DSL tying under Sections 201 and 202 of the Act.

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[21] *See Brown Shoe Co. v. U.S.*, 370 U.S. 294, 330 (1962) ("The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we have held that its use by an established company is likely 'substantially to lessen competition' although only a relatively small amount of commerce is affected. Thus, unless the tying device is employed by a small company in an attempt to break into a market, the use of a tying device can rarely be harmonized with the strictures of the antitrust laws, which are intended primarily to preserve and stimulate competition." (citations omitted). *See also Jefferson Parish Hosp. Dist No. 2 v. Hyde*, 466 U.S. 2, 9-10 (1984) ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.' The rule was first enunciated in *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947), and has been endorsed by this Court many times since. The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, 15 U.S.C. § 14, Congress expressed great concern about the anticompetitive character of tying arrangements.")

[22] *Verizon v. Law Offices of Curtis V. Trinko*, 540 U.S. __, (January 13, 2004), slip op. at 12.

[23] *Payphone Bundling Order* at ¶ 16 ("We also conclude that, without regard to whether it may violate the antitrust laws, AT & T's practice of bundling its '0 +' and '1 +' services constitutes an unreasonable practice in violation of Section 201(b) of the Communications Act.")

II. DSL TYING VIOLATES FUNDAMENTAL COMMON CARRIER OBLIGATIONS UNDER SECTIONS 201 AND 202 OF THE ACT

BellSouth's preemption petition relies heavily on the Commission's apparent finding that its tying policy does not constitute discrimination against CLECs under Section 251.[24] But the FCC has never determined, and indeed could not reasonably determine, that DSL tying does not discriminate against consumers in violation of Section 202. While the Commission does have a responsibility to open markets to competitors under Section 251, it has an even greater obligation to promote the public interest by protecting consumers. As BellSouth has itself explained, "Closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability."[25] It is undisputed that wholesale ADSL transport service is a telecommunications service. BellSouth's service is a common carrier offering tariffed in its FCC Tariff No. 1[26] and its state access tariffs. Therefore, BellSouth's tying practice is subject to the provisions of Sections 201 and 202 of the Act.

A. BellSouth's Tying Practice Results in Unreasonable Denials of Service in Violation of Section 201(a), and Constitutes an Unreasonable Term of Service Violation of Section 201(b)

Section 201(a) requires BellSouth to "furnish [its ADSL service] upon reasonable request therefor." BellSouth's policy, however, is to refuse to furnish its ADSL service to consumers who prefer to not to purchase voice services from BellSouth. There are numerous reasonable and compelling bases why some consumers do not wish to purchase voice services from BellSouth. Vonage's VoIP service, for example, offers consumers lower prices and enhanced

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24 BellSouth repeatedly refers to the state PUC orders at issue as imposing "unbundling" requirements, which, of course, they are not. The issue in this case is what BellSouth must provide to consumers, not to CLECs. BellSouth's recycling of its briefs from the *Triennial Review* offers no defense to the charge that BellSouth's practice violates Sections 201 and 202 of the Act.

25 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Comments of BellSouth Corporation, (April 8, 2003) at 46 ("Closing the market to a competitor not only unfairly punishes that competitor, but also punishes consumers because it limits their choice and thus increases price and delays availability.")

26 BellSouth Tariff FCC No. 1, § 7.2.17.

features. Consumers may also instead prefer a wireless service for its mobility, a CLEC or cable voice service for its price, or, if they are hearing-impaired, no voice service at all. The ability of consumers to choose from a wide range of competitive, innovative and efficient services is one of the fundamental aspirations of federal policy that has long favored open architecture for the Internet and inter- and intramodal competition in telecommunications. Thus, a Vonage VoIP customer who makes a request for stand-alone BellSouth service is not only making a "reasonable request"; they are making exactly the type of request that this Commission has worked so hard to make possible. As set forth below, BellSouth's refusal to serve these consumer requests contravenes Commission precedent and cannot be redeemed by any technical or economic justification. Therefore, the Commission should hold that Section 201 guarantees consumers the right to obtain broadband access service separately from voice services.

1. DSL Tying is Inconsistent with Past Commission Bundling Decisions, Which Were Designed to Facilitate Consumer Choice

The Commission has previously found that tying arrangements can violate Section 201, especially when the less-competitive product of the bundle (in this case, broadband access)[27] is not offered separately as a stand-alone service. In 1992, the Commission found that AT&T's bundling of wholesale 0+ and 1+ dialing from payphones violated Section 201 because "In order to receive commissions for '0 +' traffic, AT&T's packaging forces the PPC [private payphone company] to deliver all '1 +' traffic to AT&T, a service that the PPC may not desire from AT&T." [28] The Commission found that AT&T had the "ability to use its position in the '0 +' market to create leverage or gain unfair advantage in the more competitive '1 +' market," and

[27] In its analysis, the Commission must be mindful that, unlike past cases, voice service is not the market being leveraged; rather, BellSouth is using its position in the broadband access market to foreclose voice competition. BellSouth faces competition in the voice market, from VoIP, wireless carriers, and CLECs, almost everywhere that it provides service; BellSouth's DSL service, by contrast, faces no competition from CLECs in areas where it has deployed Digital Loop Carriers, and faces competition with cable only for some, but not all, customers. *See* Section II.B.1 of these Comments.

[28] *AT&T's Private Payphone Commission Plan*, Docket ENF-87-19, Memorandum Opinion and Order, FCC 92-453 (rel. November 4, 1992) at ¶ 14.

that in light of this ability, AT&T's bundling of these distinct services was unreasonable in violation of Section 201.[29]

The Commission has, of course, permitted bundling on certain occasions. In its 2001 *Bundling Order*, the Commission relaxed some of the restrictions on the bundling of telecommunications services with CPE and enhanced services. But while these rules permit bundling, they never have endorsed a tying practice in which a carrier refuses to offer the less competitive service except as part of a bundle. On the contrary, the relief in the *Bundling Order* was explicitly conditioned on the continued offering of stand-alone services. The Commission relied as a safeguard that other legal requirements forced LECs to offer their telecommunications services separate from CPE or enhanced services, in addition to any bundled offering.[30] Above all, the Commission found that "the separate availability of the components of a package on nondiscriminatory terms, whether through the functioning of a competitive market for each component or through existing regulatory requirements, is essential to prevent the improper extension of market power."[31]

Bundling therefore may be permitted in certain cases as an option, but not as the only option.[32] The Commission explained of its primary motivation for the *Bundling Order*,

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[29] *Id.* at ¶ 16.

[30] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183, Report and Order, FCC 01-98 (rel. March 30, 2001) ("Bundling Order") at ¶ 12.

[31] *Bundling Order* at ¶ 18. *See also Id.* at ¶ 44 ("As the Commission found in the Cellular Bundling Order, the separate availability of the transmission service is fundamental to ensuring that dominant carriers cannot discriminate against customers who do not purchase all the components of a bundle from the carriers, themselves.").

[32] A carrier might reasonably offer a bundle exclusively when there is absolutely no basis to conclude that a prohibition on such a policy is necessary to protect the public interest. For example, the Commission has permitted long-distance carriers to bundle their service with CPE without unbundling either separately. *See Bundling Order* at ¶ 26. There exists near-universal access to multiple options for both long-distance service and CPE. By contrast, while BellSouth's ADSL service is clearly subject to competition from cable modem service in many areas, substantial numbers of existing and potential BellSouth ADSL customers have no comparable alternative for broadband access. See Section II.B.1 of these Comments (citing, among other bases, the record and findings of the Florida and Georgia Public Service Commissions.).

"facilitating consumer choice is what compels us to take action in this proceeding."[33] Here, by contrast, DSL tying eliminates consumer choice. The practice is therefore inconsistent with Commission precedent and its objectives.

2. A Stand-Alone ADSL Offering is Technically Feasible and Practicable

It is technically feasible for BellSouth to offer a stand-alone ADSL loop, or to engage in a line splitting arrangement with a CLEC voice provider. BellSouth's voice and broadband services are not inherently inseparable; each can be offered without the other. In fact, BellSouth has provided stand-alone DSL service to some CLEC UNE customers in the past, before it adopted its tying policy.[34] Moreover, BellSouth lobbied the Florida PSC for the right to meet its obligations under the Florida Digital Arbitration Order by providing DSL on a separate, stand-alone loop, rather than Florida Digital's UNE loops.[35] There can therefore be no dispute that BellSouth is capable of offering DSL without its tying requirement.[36] The feasibility of stand-alone DSL is further demonstrated by the fact that most CLECs readily provide broadband service without a tying requirement. Indeed, many CLECs highlight the availability of line-shared products that are designed to allow consumers to choose a different voice provider. Carriers cannot, therefore, reasonably reject a consumer's request to purchase stand-alone ADSL service on grounds of technical feasibility or practicability where their facilities are available.

3. Stand-Alone DSL is Economically Viable

Nor is there any legitimate, reasonable economic justification for DSL tying. Of the state PUC decisions that outlawed DSL tying, BellSouth complains that "such forced sharing deprives

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[33] *Bundling Order* at ¶ 10.

[34] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 16 ("At one point, voice customers of other CLECs received BellSouth DSL service.))

[35] *See* BellSouth Petition, Exhibit 5 (March 21, 2003 Florida PSC Order at 14-15).

[36] *See* BellSouth Petition, Exhibit 9 (October 15, 2002 Kentucky PSC Order at ¶ 4 (finding no evidence that such arrangement is not technically feasible); BellSouth Petition, Exhibit 11, Louisiana Order at 8-9 (finding not only that such arrangements are technically feasible, but are operationally practicable as well)).

ILECs of the benefit of their investment in DSL deployment."[37] This contention is puzzling, as the consumers hurt by DSL tying are not asking BellSouth to "share" anything – they seek to purchase BellSouth ADSL-based service directly from BellSouth or one of BellSouth's ISP partners, at the full tariffed rate.[38] BellSouth would receive every penny of the DSL charges that it imposes on its voice customers and non-voice customers alike.

It is instructive to weigh BellSouth's "investment" argument here against the investment rationale it has espoused at other times to the Commission. In the *Wireline Broadband* proceeding, BellSouth explained its investment incentives as follows:

> A network is a very expensive asset to build and maintain. Networks are designed to handle various capacity levels, usually in excess of current expected demand, *i.e.*, it is cheaper to build a network with excess capacity and allow subscribers to grow to fit the network as opposed to expanding the network capacity every time a subscriber is added. In fact, since most network equipment is purchased in discrete sizes or lumps, adding capacity to the network one subscriber at a time is not possible. *Thus, economics of the network favor recovering the cost of the network over as many customers as possible.* This allows the carrier to achieve positive margins faster as the cost per customer is lowered. Both wholesale and retail customers add demand to the network. Thus, network costs are assigned to all offerings. Consequently, a carrier achieves greater economic benefit by obtaining more customers to share the fixed costs of the network, regardless of whether the customers are buying wholesale or retail services.[39]

With respect to DSL, however, instead of seeking "as many customers as possible," BellSouth sacrifices the expansion of its broadband service to additional retail and wholesale customers for the purpose of protecting its voice services from further competition from VoIP, wireless, and

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[37] BellSouth Petition at 3.

[38] BellSouth usually makes these arguments against unbundling or resale obligations, in which it loses a portion of the broadband market to competitors who would likely not otherwise have access, and is forced to sell its wholesale service at a rate that, in BST's apparent view, is less profitable than its retail sales. Whether there truly is an inverse relationship between unbundling and ILEC investment is not an issue here, because in this case BST is only being asked to sell its own product for its full retail price.

[39] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Comments of BellSouth Corporation (May 3, 2002) at 22 (emphasis added).

other voice alternatives. As the Georgia Commission concluded, this policy only makes sense if its goal is to have as many circuit-switched retail voice customers as possible, regardless of its effect on broadband subscribership.[40] If suppression of voice competition is the "benefit" of its DSL investment that BellSouth seeks, such benefit is not one that is worthy of the Commission's protection.

By contrast, BellSouth itself has asserted that a stand-alone DSL offering should be economically attractive, as it urges the Commission to rely upon DSL competition from CLECs that would utilize line splitting arrangements, where one CLEC provides voice service and another provides DSL.[41] If BellSouth believes that this economic model is so attractive for CLECs, how can it claim that the strategy is not viable for its own DSL offering?

Therefore, not only would it be technically and economically feasible for BellSouth to abandon its tying policy, but according to its own economic theories, it would make more money *on DSL* if it did so. The real purpose of BellSouth's tying policy appears to be to force customers to hang on to their legacy circuit-switched phone service, instead of taking advantage of lower-priced competitive offerings from CLECs, or alternative service options from newer technologies such as wireless or VoIP. BellSouth's policy therefore undermines Congress' intent for the 1996 Act "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications services and encourage the rapid deployment of new communications technologies."[42] Through violation of Section 201 and 202, and subversion of the basic tenants of Congress' competition policy, DSL tying warrants not preemption, but condemnation.

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[40] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 16 ("The apparent motivation behind BellSouth's policy is to maintain its voice customers by denying them options in a separate market. The customers do not receive a benefit from being denied this option. In fact, they are harmed by being denied the option of receiving BellSouth's DSL service and another provider's voice service. While BellSouth will inevitably lose some DSL customers because of this policy, the only reasonable assumption is that BellSouth believes that it will keep enough voice customers that would have otherwise departed for a preferred CLEC that BellSouth will still come out ahead financially.")).

[41] BellSouth Petition at 16.

[42] Preamble, Telecommunications Act of 1996.

B. BellSouth's Tying Policy Unlawfully Discriminates Against Consumers Who Desire Alternative Voice Services, in Violation of Section 202

Under Section 202, BellSouth is prohibited from engaging in unjust or undue discrimination against any customer or potential in connection with its services. As demonstrated above, there is no reasonable justification for BellSouth's refusal to provide stand-alone ADSL transport to premises where its facilities are available. Accordingly, BellSouth cannot justify its policy of discriminating, in terms of its DSL service, between people who purchase their voice service and people who do not. For victims of this discrimination who have no alternative source of comparable broadband services, this violation of Section 202 is especially deplorable because it undermines the pro-competitive goals of the 1996 Act. In its comments below, therefore, Vonage first demonstrates that many consumers have no comparable alternative to BellSouth ADSL. Second, because, DSL tying deters voice competition even among customers who do have broadband alternatives, the Commission should ban exclusive DSL tying arrangements regardless of any finding it may make with respect to a carrier's market power.

1. Many Consumers Do Not Have a Comparable Broadband Alternative to BellSouth-Based ADSL Service

BellSouth argues that the state PUCs ignored the supposed availability of alternative broadband services, such as cable modem service and CLEC line split arrangements. In reality, though, BellSouth seeks to hide the fact that many consumers, especially small business customers, have no comparable alternative to BellSouth-based DSL service.

Residential and small business customers generally have, at *most*, three potential broadband choices: ILEC DSL, CLEC DSL, and cable modem service.[43] However, at least in BellSouth's region, CLEC DSL is and is likely to remain unavailable to the vast majority of consumers because of the widespread deployment of Digital Loop Carriers (DLCs), which in

[43] Satellite broadband is considerably slower and less reliable, yet costs substantially more than wireline alternatives. It is generally not considered a comparable alternative to cable or DSL at this time, even by the providers themselves.

Florida serve 90% of the end-user premises in BellSouth's region.[44] As the Commission is well aware, CLECs are unable to provide DSL services where DLCs are deployed without collocating their own DSLAM functionality at remote terminals.[45] Vonage is not aware of any substantial planned or actual deployment by a CLEC or an out-of-region ILEC to establish such DSL capability in the BellSouth region. It would therefore be unreasonable for the Commission to tell consumers that they must rely on the availability of line splitting if they wish to purchase broadband and competitive voice services.

While cable broadband is more widely available in the residential market, it does not reach all homes served by BellSouth DSL, and reaches hardly any businesses.[46] The Georgia PSC found that BellSouth has market power even in a combined cable/DSL broadband market, as DSL leads cable in Georgia, and BellSouth held a "substantial majority" of the DSL lines in its region.[47] The Commission noted that BellSouth's own testimony acknowledged that "a substantial number of Georgia customers have access to BellSouth DSL but not to cable broadband."[48] The Florida Commission similarly had before it evidence, presented by BellSouth itself, indicating that fewer than 1% of small business customers could obtain cable broadband services, and that for the foreseeable future, cable modem providers are unlikely to deploy broadband access to approximately 25% of their total residential footprint.[49] While numbers

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[44] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 1-3 and Exhibit 1 (presenting evidence based upon BellSouth's admissions and testimony that 90% of end-users in the BellSouth-Florida region are served by DLC loops, and that BellSouth possesses a *99%* share of the DSL market in its region in Florida.)

[45] *See, e.g., Triennial Review Order* at ¶ 290.

[46] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 11-12 and Exhibit 3 (citing evidence presented by BellSouth in the Florida Digital-BellSouth arbitration that cable broadband service is obtained by less than 1% of small and medium sized businesses, and that, for the foreseeable future, cable broadband providers were unlikely to extend the availability of broadband service to approximately 25% of their residential customers.).

[47] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 10-16).

[48] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 10).

[49] *See supra* note 46.

vary by market, it is clear that there are and will continue to be consumers who cannot purchase cable broadband service. For example, the California PUC has stated that only 15% of Californians have a choice between DSL and cable,[50] and that 45% of consumers in SBC territory who have access to DSL and/or cable broadband have DSL as their only wireline broadband choice.[51] Thus, while cable modem service may allow some consumers to escape some effects of BellSouth's tying policy, many consumers are afforded no such relief.

Although BellSouth may argue that consumers who *do* have broadband choices are not affected (as much) by tying, the Commission must first focus its attention on those who do not, because these are the consumers most harmed by tying restrictions. The fact that a neighbor can obtain cable broadband to escape a tying restriction provides no consolation today to the millions of end users who can only obtain broadband service from an RBOC. These consumers not only must continue to wait for the benefits of broadband competition, but they are also denied the benefits of competitive and innovative voice services from VoIP providers, wireless carriers and CLECs that would otherwise be available to them today. Whatever their number, there is no doubt that many consumers are trapped by DSL tying; indeed, the Georgia Commission concluded that if no one could be captured by the tying requirement, BellSouth would likely abandon it.[52] The Commission should free all consumers by eliminating all broadband tying requirements.

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[50] *See* Communications Daily, Vol. 22, No. 100 at 5 (May 23, 2002) (describing Chairman Lynch's testimony to Congress).

[51] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Comments of the California Public Utilities Commission (May 3, 2002) at 1.

[52] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 16 ("The apparent motivation behind BellSouth's policy is to ... insulate[] BellSouth's voice service from competition because customers that would like to switch to a preferred CLEC for voice service have a disincentive to do so. BellSouth points to alternatives available to MCI, such as resale, cable modems, MCI's own DSL service and line splitting. As a preliminary observation, BellSouth's arguments do not ring true on this point. If BellSouth believed that customers would pursue these other options, then it could not afford to continue its [tying] policy.")

2. Even for Customers with Broadband Alternatives, BellSouth's Tying Policy Suppresses Competition for Voice Services and Broadband Applications

Whether or not BellSouth can be said to have market power in broadband generally, it clearly has a degree of power over the nearly 1.5 million[53] customers who have existing DSL service from BellSouth. First, as discussed above, many of these customers have no comparable broadband alternative. But even for those who could obtain alternative broadband service, there exist many disincentives for a customer to drop a broadband service they otherwise want for the purpose of obtaining alternative voice services, whether from a wireline CLEC or cable company, a VoIP provider, or a wireless carrier. Consumers should be allowed to keep their broadband *and* select their chosen voice provider; because that choice is denied to them, these consumers are forced to consider whether they are willing to:

- lose their BellSouth email addresses and web hosting services;
- pay early termination charges to BellSouth;[54] and
- endure the service termination and reinstallation processes, which can result in downtime; acquisition of new modem equipment; site visits by network technicians; and reconfiguration of software, hardware, LAN and home networking equipment, PC settings, user passwords, etc.

Cumulatively, these consequences of changing broadband providers may in the mind of some customers outweigh the advantages of selecting a new voice services provider.[55] The desire to keep an existing email address can be as powerful an incentive for the *status quo* as the ability to keep a telephone number, an issue that the Commission has addressed with its number portability regulations. DSL tying forces these consumers to make a choice that they should not have to

[53] *See* BellSouth 4th Quarter 2003 Results, http://bellsouthcorp.com/proactive/newsroom/-release.vtml?id=44808&PROACTIVE_ID=cecfc7c8c7cececbc7c5cecfcfcfc5cececcc8c6cecec7cfcac5cf (viewed January 22, 2004).

[54] *See* http://www.fastaccess.com/content/consumer/conditions.jsp?a=b (viewed January 15, 2004).

[55] In addition, some consumers may believe that DSL is preferable to cable modem service. BellSouth itself urges customers to compare DSL with cable modem service, reminding them that "FastAccess Service provides a dedicated connection to your home to the BellSouth DSL network. Cable modem service shares a connection with other cable modem subscribers." See http://www.fastaccess.com/ content/consumer/ common_questions.jsp# compares (viewed January 22, 2004).

make. Instead, if the Commission enjoins DSL tying, consumers would be able to receive the benefits of broadband and of voice competition. By discriminating against consumers who desire an alternative voice provider, DSL tying violates Section 202 and undermines the goals of the 1996 Act.

Finally, failure to prohibit tying would surrender the future of innovation and development of consumer broadband services and application to the mercy of the broadband infrastructure companies – companies that are often more adept at protecting entrenched services than developing new ones. While cable broadband providers have not joined BellSouth in attempting to shut out competitive VoIP services, consumers should not be left to depend on a duopoly to define the entirety of our broadband future. Chairman Powell, in explaining his vote not to approve the proposed DirecTV-EchoStar merger, reasoned that a duopoly market cannot be expected to deliver the benefits of innovation and unfettered competition to consumers:

> At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.[56]

The same fate awaits consumers if DSL tying is allowed to prevail. Federal policy should instead favor as strongly as possible the preservation of the open architecture that created and has come to define the Internet. Accordingly, protecting the ability of consumers to benefit from competitive broadband applications and services is at least as important today as was open access

[56] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, Separate Statement of Chairman Michael K. Powell (rel. Oct. 18, 2002).

to competitive Internet Service Providers in the 1990s. Of that policy, Commissioner Abernathy has explained:

> [O]ur *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice.[57]

DSL tying deprives consumers of the opportunity to take full advantage of competitive and innovative services from VoIP providers, wireless carriers, and other competitive alternatives, without any offsetting public interest benefit. The elimination of DSL tying is clearly, therefore, a regulation that is necessary to "safeguard competition and consumer choice." By denying the benefit of broadband to consumers unwilling to sacrifice this choice, BellSouth's DSL tying policy is discriminatory in violation of Section 202 and should be enjoined.

III. The FCC Should Prohibit Broadband Tying Arrangements

For the foregoing reasons, the Commission should prohibit facilities-based carriers and their affiliates from requiring the purchase of voice service as a condition of purchasing broadband telecommunications or information services. Federal action is appropriate, as the Commission is in the best position to require any necessary changes to BellSouth's FCC Tariff No. 1 that may underlie its tying policy.[58] If the Commission believes it lacks a sufficient basis to provide such relief in this docket, it should initiate additional proceedings as may be necessary

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[57] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Notice of Proposed Rulemaking, Separate Statement of Commissioner Kathleen Q. Abernathy (February 14, 2002).

[58] It should be noted that BellSouth's tariff does not clearly support its interpretation that ADSL transport will not be offered on lines where a CLEC is the retail voice provider via resale or UNEs.

to eliminate tying practices that deny consumers the right to select the providers and technologies of their choice.

Respectfully submitted,

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